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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 249

FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner,

vs.

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Fibreboard Paper Products Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on February 3, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported except at 51 Labor Cases, par. 19,503. Its opinion upon denial of a rehearing is reported at 51 Labor Cases, par.

19,700. The two opinions, along with the Court's judgment, are reproduced in Appendix A hereto.

JURISDICTION

The judgment of the court below was entered on February 3, 1965. On February 26, 1965, within the time allowed by rule of court, a petition for rehearing was filed. On April 20, 1965, the petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The jurisdiction of the courts below rested on 29 U.S.C., Sec. 185 and 28 U.S.C., Sec. 1292(b).

QUESTIONS PRESENTED

1. Where there is in effect a bargaining contract providing for a grievance procedure culminating in arbitration, does the duty to bargain require management to negotiate with the union in advance of acting in the exercise of a right asserted by it under the contract?

2. May a court, in collateral litigation presenting an issue upon which the National Labor Relations Board has passed in an unfair labor practice case, deny effect to the Board's finding upon the basis of surmise that its decision and order would have been the same even if its finding had been to the contrary?

STATUTES INVOLVED

Statutes involved are section 301 of the Labor Management Relations Act (29 U.S.C., Sec. 185) and section 10 of the National Labor Relations Act (29 U.S.C., Sec. 160). Their text is set forth in Appendix B hereto.

STATEMENT

This is an action by Respondent, a labor union, for alleged breach of a bargaining contract. The case arises out of the same facts that were before this Court in *Fibreboard Paper Products Corporation v. National Labor Relations Board*, 379 U.S. 203 (1965), wherein the Court held Petitioner guilty of a refusal to bargain in contracting out certain work following expiration of the bargaining contract here involved without prior negotiation with Respondent. The National Labor Relations Board had found that the bargaining contract expired on July 31, 1959, by reason of a sixty-day notice given by Respondent, and part of its decision was based explicitly on that finding (Tr. 91, 99).[1] Expiration of the contract also lay at the forefront of the facts to which this Court limited its decision.

Respondent nevertheless contends in the present case that the contract did not expire on July 31, 1959, but was automatically renewed, and that Petitioner's action in contracting out the work was in breach thereof.

In the district court, Petitioner affirmatively pleaded as a collateral estoppel the Board's finding that the contract had expired (Tr. 39-40). The district court struck the plea (R. 36-37, 43), and the court below affirmed upon the ground that the Board's finding was not material to its decision. This is the holding of which we now seek review.

The facts

A brief statement of the factual background should serve to refresh the Court's recollection.

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1. This and similar references are to the printed Transcript of Record in the court below, nine extra copies of which have been filed with this Court.

Petitioner and Respondent were parties to a bargaining contract containing a grievance procedure culminating in arbitration, and a no-strike clause (Tr. 25-26). The expiration date of the contract was July 31, 1959 (Tr. 8). The contract provided for automatic renewal in the absence of a sixty-day notice from one party to the other of a desire to terminate or modify (Tr. 8), but on May 26, 1959, Respondent had given such a notice (Tr. 26).

On July 27, 1959, Petitioner advised Respondent by letter that it had decided to contract out the work commencing August 1, 1959, the day following expiration of the contract (Tr. 61, 62). Respondent thereupon wrote Petitioner as follows (Tr. 63):

> "We interpret your letter to mean that you are attempting to cancel your present agreement with us. If that is your intention you are too late. We direct you to the provision of the agreement which requires that you should have given us at least sixty (60) days notice of cancellation prior to the July 31, 1959, expiration date.
>
> "In the absence of such notice, the contract has been automatically renewed for another year . . ."

Petitioner replied (Tr. 64-65):

> "Under date of May 26, 1959, you notified us of your desire to modify the Agreement and to meet with us for the purpose of negotiating a new agreement to be effective August 1, 1959 . . . Our Agreement therefore will expire at midnight July 31, 1959, and will not be automatically renewed . . .
>
> "Aside from the foregoing, the Agreement does not prohibit us from letting work to an independent contractor, and we have the right to do so . . ."

The decisions of the Board and the Court below

Petitioner thereafter was charged with certain unfair labor practices. One charge was that it had breached its bargaining duty in contracting out the work without prior negotiation with Respondent (Tr. 49-50). Another was that it had attempted to terminate the bargaining contract without having given the notices required by section 8(d) of the National Labor Relations Act (Tr. 50).

The Board found that the bargaining contract, by reason of the sixty-day notice given by Respondent, had not been automatically renewed but had expired on July 31, 1959, the day before Petitioner contracted out the work.[2] For this and other reasons, it dismissed the complaint in its entirety (Tr. 99).

Later, upon reconsideration, the Board held Petitioner guilty of the first charge above mentioned (breach of its bargaining duty in contracting out the work without prior negotiation) and issued an order designed to remedy that violation (Tr. 107-121). This was the aspect of the case

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2. The Trial Examiner found and concluded (Tr. 91):

> "Here, the contract terminated at midnight on July 31, not only by its terms but also by reason of the Steelworkers' May 26 notice . . . Under the circumstances Respondent [Petitioner herein] was under no statutory duty to serve any notice called for under section 8(d). Since the Steelworkers' May 26 notice requesting bargaining meetings looking toward a 'new contract' was timely served, the automatic renewal clause of the contract in question fell with such service, and the undersigned so finds."

The Board adopted generally the findings and conclusions of the Trial Examiner (Tr. 93), and with specific reference to that just quoted, said (Tr. 99):

> "We also agree with the Trial Examiner for the reasons stated in the Intermediate Report that the Respondent did not violate section 8(d) of the Act by failing to abide by the notice provisions of that section when it decided to contract out the maintenance work upon expiration of the existing contract."

which ultimately reached this Court. Expiration of the contract was one of the facts which this Court deemed pertinent and to which it limited its decision. The majority opinion referred to the contract as having expired on July 31, 1959 (379 U.S. at 205-206), and the concurring opinion was careful to state that the question presented "goes to the scope of the employer's bargaining duty in the absence of a collective bargaining contract" (379 U.S. at 219). The relevance of expiration of the contract to the scope of the bargaining duty arose from the presence in the contract of the grievance procedure. Had the contract been renewed, the question would have been presented whether the grievance procedure relieved Petitioner of any duty to engage in negotiations foreign thereto. See *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (6th Cir. 1947), denying enforcement of 70 NLRB 500.

The court below held that "whether the contract was or was not a continuing one was wholly immaterial" and thereby decided the foregoing question in the negative.

The court erred also in another respect. The Board did not upon reconsideration disturb its original holding that Petitioner had not violated the notice requirements of section 8(d). That holding was based explicitly upon the finding that the contract had expired on July 31, 1959, by reason of the notice given by Respondent.[3] It is the Board's practice in remedying violations of the notice requirements of section 8(d) to include in its order a provision requiring that the offending party refrain from insisting upon a change in the provisions of the contract without giving the notices required by that section (*Matter of John W. Bolton & Sons, Inc.*, 91 NLRB 989, 990 (1950); *Local No. 156, United Packinghouse Workers of America*, 117 NLRB 670,

3. See n. 2, *supra*.

673 (1957); *Local Union 219, Retail Clerks International Association*, 120 NLRB 272, 273 (1958), enforced 265 F.2d 814 (D.C. Cir. 1959)). Since it had held Fibreboard guiltless of a violation of the notice requirements, the Board refrained from including any such provision in its order (see Tr. 118-121).

In holding that the finding of expiration of the contract was "wholly immaterial", the court below assumed among other things that the content of the Board's order was unaffected by its holding, based on that finding, that Petitioner had not violated the notice requirements of section 8(d).

THE REASONS FOR GRANTING THE WRIT

1. In holding that Petitioner's bargaining duty would have required negotiation in advance of contracting out the work even if the bargaining contract and its grievance procedure had continued in effect, the court below rendered a decision which conflicts with a decision of the Sixth Circuit upon an important question of federal law which has not been, but should be, settled by this Court.

The question whether the existence of a contract containing a grievance procedure dispenses with the necessity for negotiation prior to exercise by management of a right asserted by it under the contract is of daily concern to employers and unions alike. It is a question upon which the decision of the court below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (1947), and is a question upon which this Court has touched but never passed. It should be laid to rest.

The conflict with the Sixth Circuit.

In *Timken Roller Bearing Co. v. NLRB, supra*, the employer, on a number of occasions during the life of a con-

tract containing a grievance procedure, had contracted out work without prior consultation with the union. When the union requested negotiations upon the subject, the employer refused, asserting that it had the right to contract out work and that if the union thought otherwise it should invoke the grievance procedure. The Board held the employer guilty of a refusal to bargain (70 NLRB 500, 504), but the court denied enforcement of the Board's order. It said:

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement." 161 F.2d at 955.

It therefore held that the employer was not guilty of a refusal to bargain in declining to engage in negotiations foreign to the contractual grievance procedure.

The decision below is in square conflict with the foregoing. As heretofore noted, the court's holding that expiration of the bargaining contract was not material to the question whether Petitioner was required to negotiate in advance of acting was but another way of saying that even if the contract had continued in effect, prior negotiation would have been required.

The decisions of this Court.

This Court has said that where a bargaining contract contains a grievance procedure and a no-strike clause, "then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interferences by strikes." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960). It follows that the only bargaining remaining to be done during the life of such a contract is that involved in con-

struing and applying it.[4] This is the office of the grievance procedure:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous bargaining process." *Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 581.

Must management, when it desires to take action which it considers to be within its rights under the contract, first negotiate to an impasse with the union? Or is it free to act without prior negotiation, leaving it to the union to invoke the grievance procedure if it takes exception to management's conduct?

The latter has been the course normally followed throughout industry with respect to matters such as hiring, firing, discipline, lay-off, promotion, demotion, and the assignment and scheduling of work. The employer has acted first and talked later if and when the grievance procedure was invoked. The practice has not been confined to matters of daily routine; for example, *Steelworkers v. Warrior & Gulf Navigation Co., supra,* like the *Fibreboard* case, involved layoffs due to the contracting out of maintenance work.

A number of decisions of this Court stress the importance of the role played by the contractual grievance pro-

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4. Section 8(d) of the National Labor Relations Act (29 U.S.C., Sec. 158(d)) specifically provides that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

cedure in the collective bargaining process and the favor with which it is regarded by federal policy. *Steelworkers v. Warrior & Gulf Navigation Co., supra*; *Textile Workers v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957); *Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964); *Republic Steel Corp. v. Maddox,* 85 S.Ct. 614 (1965). These cases have to do with specific enforcement; but does not the federal policy which requires specific enforcement by the courts also require that the Board, in enforcing the duty to bargain, respect the procedure through which the parties to a contract have agreed that their bargaining shall be done? See *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261 (1964).

The Board itself has recognized that it "should give hospitable acceptance to the arbitral process as part and parcel of the collective bargaining process itself" (*International Harvester Co.,* 138 NLRB 923, 927 (1962)). Thus, in *International Chemical Workers Union,* 123 NLRB 1507 (1959), the Board held that the employer was not required to go outside the grievance procedure in bargaining about grievances and that the union was guilty of a refusal to bargain in insisting that he do so. Accord: *NLRB v. Knight Morley Corp.,* 251 F.2d 753 (6th Cir. 1958), enf. 116 NLRB 140, *cert. den.* 375 U.S. 927. See also *General Motors Corp.,* 149 NLRB No. 40, 57 LRRM 1277 (1964), and *Ador Corp.,* 150 NLRB No. 161, 58 LRRM 1280 (1965), holding that management is not required to notify or consult with a union in advance of acting in the exercise of a right reserved to it by a bargaining contract.

The Board's *Fibreboard* decision induced a flood of un-

fair labor practice litigation[5] and a great deal of uncertainty as to the propriety of what had theretofore been stabilized practice. The decision of this Court left unanswered most of the questions with which the Board's decision had plagued employers. Much of the uncertainty, and many of the fears as to the implications of this Court's decision,[6] would be dispelled if it were made clear that the requirement of prior negotiation is without application where there is in effect a contract containing a grievance procedure through which the parties have agreed to discharge their bargaining obligations. We submit that the doctrine of *Timken Roller Bearing Co., supra,* merits the consideration and approval of this Court.

2. The question whether a court may disregard a finding of the Board upon the basis of conjecture as to what the Board's decision and order would have been had its finding been to the contrary goes to the heart of the relationship between the Board and the courts; upon its answer depends the extent of the area, which this Court has sought to limit, of potential conflict between the Board and the courts.

In holding that the Board's finding of contract expiration was not essential to its decision, the court below assumed that the Board's order would have been the same even if it had found that the contract remained in effect. Aside from the criticism to which we have just subjected that assumption, it completely ignored Board practice.

The Board's holding that Petitioner had not violated the notice requirements of section 8(d) was based explicitly

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5. When we were preparing our petition for certiorari in that case, we were informed by the office of General Counsel that there were then pending before the Board at one stage or another 55 cases in which the complaints were based in whole or in part upon the Board's decision therein.

6. See concurring opinion, 379 U.S. at 218, et seq.

on its finding that the bargaining contract had expired by reason of the notice given by the Union. Had Petitioner been held guilty of a violation of the notice requirements, the Board's order presumably would have included a provision of the kind normally employed by the Board in remedying such violations (see page 6, *supra*). The order contained no such provision.

The jurisdiction of the Board in remedying unfair labor practices and the jurisdiction of the courts in remedying breaches of contract and certain other wrongs, while mutually exclusive, are nevertheless rife with potential conflicts. See, for example, *United Brick & Clay Workers v. Deena Artware Inc.*, 198 F.2d 637 (1952), *cert. den.* 344 U.S. 897, and *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (1952), *cert. den.* 345 U.S. 906, both decided on the same day by the Court of Appeals of the Sixth Circuit, in which a jury and the Board made conflicting findings and reached diametrically opposite results. The danger of "incompatible or conflicting adjudications" by the Board and the courts was a consideration which moved this Court to hold in *Garner v. Teamsters Local Union*, 346 U.S. 485 (1953), that the courts are without power to act upon matters within the Board's jurisdiction. See also *Webber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Amalgamated Meat Cutters, Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 (1957), 359 U.S. 236 (1959).

By rejecting the Board's finding, the court below has opened the door to a contrary finding by a jury and to an adjudication in the present case conflicting with that of the Board in the unfair labor practice case. It has done so on the basis of an ill-considered guess as to what the Board's

decision and order would have been had its finding been other than what it was and the case therefore a different one than that which it decided. The following language from *Garner v. Teamsters Local Union, supra,* is pertinent:

> "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us." 346 U.S. at 489.

CONCLUSION

We respectfully submit that the case presents questions meriting consideration by this Court and that this petition for certiorari should be granted.

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(Appendix Follows)

Appendix A

United States Court of Appeals for the Ninth Circuit

No. 19,006

Fibreboard Paper Products Corporation, A Corp.,
Appellant,
vs.
East Bay Union of Machinists, Local 1304, etc., et al.,
Appellees.

[February 3, 1965]

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before Pope, Koelsch and Duniway, Circuit Judges.

Pope, Circuit Judge.

This is an action brought by the appellee Unions[1] against the appellant, here called Fibreboard, to recover damages on account of an alleged breach by Fibreboard of a collective bargaining agreement between the Union on the one hand and Fibreboard on the other. Answering the complaint, Fibreboard, in addition to denying certain of its allegations, pleaded three separate affirmative defenses which we shall describe shortly. The Union moved to strike these three affirmative defenses and the court sustained the motion to strike the second and third and denied the motion to strike

1. The complaining Unions are East Bay Union of Machinists, Local 1304, United Steelworks of America, AFL-CIO, an unincorporated association, and United Steelworkers of America, AFL-CIO; for convenience we treat them collectively, under the name "Union".

the first of such defenses. Pursuant to the trial court's determination that an immediate appeal from such order would materially advance the ultimate termination of the litigation, this court pursuant to the provisions of 28 U.S.C. § 1292(b), granted appellant's application to take this appeal which has now been briefed and argued and is before us for decision.

The record upon which the trial court made its ruling was not limited to the pleadings alone. The ruling took into account other facts, as we shall note. These disclosed that Fibreboard had a manufacturing plant at Emeryville, California; that it carried on its own maintenance work in and about the plant, and its maintenance employees were represented, for purposes of collective bargaining, by the East Bay Union of Machinists, Local 1304, one of the appellee Unions. During the year August 1, 1958 through July 31, 1959, the Union and Fibreboard had a collective bargaining contract in effect which contained a provision for automatic renewal "from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration." On May 26, 1959, the Union notified Fibreboard that it desired "to modify as of August 1, 1959 the collective bargaining contract dated July 31, 1958, now in effect between the Company and the Union. The Union offers to meet with the Company at such early time and suitable place as may be mutually convenient, for the purpose of negotiating a new contract."

Under date of June 15, 1959, the Union wrote to Fibreboard requesting a meeting to discuss certain "proposed changes in the working arrangement between the parties." These proposed changes related to wage scales, seniority, hours of work and overtime, holidays, night differentials,

vacations, a welfare plan and new provisions for adjustment of complaints. Fibreboard did not meet with the Union for these purposes because at that time Fibreboard was studying the possibility of effecting savings in its maintenance work by having the work done by an independent contractor specializing in plant maintenance. It made such a contract with Fluor Maintenance Company, effective August 1, 1959. On July 27, 1959, the Union was told of Fibreboard's decision to contract out the work and that hence "negotiations of a new contract would be pointless."[2]

The complaint alleges that on July 31, 1959, approximately 50 men employed by Fibreboard on maintenance work, who were members of the Union and covered by the collective bargaining agreement, were discharged and locked out by Fibreboard and that this was a breach of the collective bargaining agreement referred to. Defendant, in its answer, alleged that the contract between itself and the Union terminated on July 31, 1959. It admitted that at the end of that day defendant terminated the employment of the individuals theretofore employed in maintenance and power house work in and about its plant. It then pleaded as a separate and first affirmative defense that the contract, of which a copy was attached to the complaint as an exhibit, provided "that all grievances, including claims of the kind asserted in the complaint, shall, if the parties

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2. The portions of the record which do not appear in the pleadings themselves are portions of the joint appendix in the case of East Bay Union of Machinists, Local 1304 v. N.L.R.B. (D.C. cir.) 322 F. 2d 411, in which the court reviewed and enforced the order of the Labor Board hereafter referred to. Just how these matters became a part of the record before the district court is not clear. They were not made part of any pleading. They were attached to a brief filed in support of a motion for summary judgment. Both parties treat them as properly a part of the record below. We assume the court could take judicial notice of them as a public document under the rule applied in Zahn v. Transamerica Corporation, 3 cir., 162 F. 2d 36, 48, footnote 20.

cannot adjust the same by negotiation, be submitted to final and binding arbitration." Its second affirmative defense was as follows: "That plaintiffs and defendant herein were parties to proceedings before the National Labor Relations Board in which plaintiffs claimed and asserted that the contract, of which a copy is attached to the Complaint as Exhibit A, was on July 31, 1959, automatically renewed for another year and in which defendant claimed and asserted that the said contract was not on July 31, 1959, renewed automatically or otherwise for another year but that said contract terminated on said date; that the National Labor Relations Board, on March 27, 1961, made and rendered in said proceedings its Decision and Order in and by which the said National Labor Relations Board found and determined that the said contract terminated on July 31, 1959, and was not automatically renewed; that said Decision and Order so holding has become final and is conclusive of the question whether said contract terminated on July 31, 1959."

The third so-called affirmative defense stated in the answer was as follows: "That the Complaint herein fails to join indispensable parties in that it fails to join any of the individuals who were employed by defendant on and prior to July 31, 1959, in powerhouse or maintenance work and who are claimed in said Complaint to be entitled to benefits under said contract." As above indicated, the motion to strike affirmative defenses filed on behalf of the Union was directed against all three of these defenses just described, the second and third of which were stricken. The appeal now before us is from that order.

Referring to the third affirmative defense, to the effect that there has been a failure to join the individual members of the Union who are indispensable parties, it is our view

that the order striking the defense was proper for the reasons set forth in Retail Clerks Union Local 1222 v. Alfred M. Lewis, Inc., 9 cir., 327 F.2d 442. In that case the plaintiff union brought an action against an employer to require the latter to comply with the provisions of a collective bargaining agreement between the plaintiff union and the defendant employer. It was contended that the action was in essence an attempt by the union to enforce individual wage claims of its members and that such action did not fall within the jurisdiction conferred upon the district court by § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). This court held that the action was properly brought and reversed the order of the district court which dismissed the action "for lack of jurisdiction over the subject matter."

Appellant asserts that that case is not in point here since it merely held that the union could bring a law suit to enforce a collective bargaining agreement. It is true that in that case the phrase "indispenable parties" was not used, perhaps because it never occurred to any one to suggest that a problem of indispensable parties existed. But it seems to us that the holding there necessarily controls upon the point we now discuss. The third affirmative defense was properly stricken.

To fully understand the issues relevant to the striking of the second defense, it is necessary first to outline the issues involved in the Labor Board proceedings, upon which the claim of collateral estoppel is based, and in the instant litigation. In this action, if the decision of the district court is affirmed, the issues ultimately to be decided[3] will

3. Initially, of course, the court will have to determine if all or any of these questions should be decided by the court or by an arbitrator.

be: (a) Did the contract between the Union and Fibreboard terminate on July 31, 1959? If so, the court cannot hold that the employer's conduct was a breach of any contract for there was none; (b) If the contract did not terminate but continued following July 31, 1959, was the act of contracting out the work in violation of the contract either (1) because it was the basis for a grievance procedure within the meaning of the grievance and arbitration provision of the contract so that the employer would be obliged to submit the claimed grievance to arbitration within the meaning of Steelworkers v. Warrior & Gulf Co., 363 U.S. 574,[4] or (2), if not a proper subject for grievance procedure, because it was in violation of some other provision of the contract. If it should be found that contracting out was not an act

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4. The grievance and arbitration provisions of the Union contract were as follows: "Section XXI. Adjustment of Complaints (a) In case a grievance arises, it shall first be taken up by the Shop Steward of the shop committee of the Union (who shall be recognized by the Plant) with the foreman or shop superintendent and adjusted within forty-eight (48) hours. If no agreement is reached, then the grievance is to be referred and taken up by an executive of the Plant (to be designated by the Plant) and a representative of the Machinists' Union.

"(b) Pending negotiations for settlement of grievances or the Agreement, there shall be no strike or lockout.

"(c) If the Plant and the Union agree an employee has been unjustly discharged, he shall upon being reinstated return to his regular job with seniority unimpaired, and shall receive full pay for time lost.

"(d) In case these efforts at adjustment fail, the subject in question shall be submitted to an impartial arbitrator mutually agreed upon by both parties to this Agreement whose decision shall be final and binding."

For a discussion of the difference between the obligations under a grievance clause in a contract and the obligation to bargain collectively, see the comments of David E. Feller in "Arbitration Journal", Vol. 19, No. 2, 1964, referring to the Labor Board decision here referred to. In Fibreboard Corp. v. Labor Board, ... U.S. ....., the Supreme Court noted: "Provisions relating to contracting out exist in numerous collective bargaining agreements, and 'contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.'"

either prohibited by the contract or one required by the contract to be submitted to grievance and arbitration proceedings, then again a conclusion of no breach of contract would appear to be indicated. Again, if it be found that failure of Fibreboard to permit discussions under the grievance procedures was a violation of the contract, then it would be necessary to ascertain what, in the way of damages, could be said to be the consequences of such a breach.[5]

The questions which we thus contemplate as matters to be decided when the present case is heard are not matters properly to be brought before the Labor Board. Recovery in the present suit must be based upon an existing contract, and its obligations. Issues as to those matters were not, and could not be, before the Board. Its decisions deal solely with questions of unfair labor practices as defined in the Act; and breach of a collective bargaining agreement is not an unfair labor practice. International Union, etc. v. NLRB, D.C. Cir., 257 F. 2d 211, 214-215; Independent Petroleum, etc. v. Esso Stand. Oil Co., 3d cir., 235 F. 2d 401, 405; N.L.R.B. v. Pennwoven, Inc., 3d cir., 194 F. 2d 521, 524.

An examination of the Labor Board proceedings will disclose that the issues involved there differed materially from those involved in this § 301 suit. The record in the Court of Appeals of the District of Columbia Circuit, to which we have referred, contains a copy of all the essential portions of a certain proceeding initiated before the Na-

5. An interesting subject of speculation is whether or not a problem of proximate cause would arise in this situation. When the employer is charged with refusal to conform to the grievance procedures of the contract, can it be proven that had he obeyed these requirements the result would have favored the Union? And is it necessary for the Union to prove that it would have prevailed in such arbitration proceedings in order to prevail here?

tional Labor Relations Board upon a complaint based upon a charge of the Union growing out of the contracting out here mentioned. The General Counsel alleged in substance that Fibreboard, in terminating the employment of the employees above mentioned, and in subcontracting with Fluor the work previously done by them, without first bargaining collectively with the Union with respect to its proposal to contract out this work, had violated §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act.

Following the filing of that complaint hearing was had before a trial examiner who made findings and conclusions that Fibreboard had not engaged in unfair labor practices and recommended that the complaint be dismissed in its entirety. The trial examiner first held that the company was "free to suspend operations for business reasons which are not concerned with protected employee activity;" he then found that Fibreboard's decision to contract out the maintenance work was motivated solely by economic reasons. Accordingly, he held that Fibreboard had not violated the Act by its unilateral decision to contract out its maintenance work.

The trial examiner then turned to the claim that Fibreboard had violated its obligations under § 8(d) by not serving appropriate notices that it was terminating the contract. He found that the contract between Fibreboard and the Union terminated at midnight on July 31, 1959, "not only by its terms but also by reason of [Union's] May 26 notice. . . . Since the [Union's] May 26 notice requesting bargaining meetings looking toward a 'new contract' was timely served, the automatic renewal clause of the contract in question fell with such service, and the undersigned so finds." Upon the basis of that finding the examiner held that Fibreboard was under no statutory duty to serve any notice called for under § 8(d).

The trial examiner's recommendations for the dismissal of the complaint were thereafter approved and adopted by the National Labor Relations Board. Subsequently, upon a petition filed by the General Counsel the Board granted the charging Union's petition for reconsideration, and upon such reconsideration filed a supplemental decision and order holding that Fibreboard had violated § 8(a)(5) of the Act by unilaterally subcontracting its maintenance work without bargaining with Union with respect to its decision to do so. Its order contained the usual cease and desist directions and required the taking of certain affirmative action on the part of Fibreboard. Review of that order was sought in the Court of Appeals for the District of Columbia in the case previously mentioned and the Board by cross motion sought enforcement of its order. The order of the Board was enforced. East Bay Union of Machinists, Local 1304 v. N.L.R.B., supra. That decision was affirmed by the Supreme Court, December 14, 1964, Fibreboard Corp. v. Labor Board, supra, footnote 4.

It thus appears that the issues presented in the present § 301 action, and those heard before the Labor Board are entirely different. As noted in United Steelworkers v. American Internat'l Aluminum Corp., 5 cir., 334 F. 2d 147, 152, "the problems are not at all alike."[6]

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6. The wide gap between issues that the court must decide and issues that the Board decided must be borne in mind when we consider the nature of the remedy which the Board enforced in connection with its order. By way of affirmative action "which the Board finds will effectuate the policies of the Act" the Board directed that the employer "reinstate the maintenance operation previously performed by its employees" and that the employer "offer to those employees immediate and full reinstatement," and reimburse them for loss of pay to the limited extent mentioned in the Board's order. For reasons explained by the Board it limited back pay to earnings which might have been received from and after the Board's final order and not from the date the employer initially terminated the employment.

Obviously the reinstatement was not because of any determina-

Despite the difference in the issues involved in these two proceedings, Fibreboard argues that the above quoted decision of the trial examiner that the contract had terminated operates as a collateral estoppel, and that accordingly its second affirmative defense quoted above should not have been stricken by the trial court. It asserts that the decision of the examiner, described above, was adopted by and became a part of the decision of the Labor Board itself; that thereby the Labor Board adjudged that the contract had terminated on July 31, 1959, by reason of the sixty day notice given by the Union, and that under the rules relating to collateral estoppel by judgment, this decision of the Labor Board had, in the words of the affirmative defense pleaded, "become final and is conclusive of the question whether said contract terminated on July 31, 1959." As provided in § 10 of the Act, (29 U.S.C. § 160), the Unions were allowed to intervene in the proceedings before the examiner and to introduce evidence and to participate in the arguments. Appellant therefore argues that the Unions, through such participation, are subject to the claimed collateral estoppel to question the adjudication that the contract here in question terminated on July 31, 1959.

Even if we assume that a determination of an administrative board may be the basis for a claim of collateral estoppel to be applied in a subsequent action in a court,

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tion that the union contract continued or would continue to be in effect during this period of reinstatement. As noted by the Supreme Court in affirming the Labor Board's action, this order for reinstatement was performed by the Board by way of "devising remedies to effectuate the policies of the Act." The Court noted that "in fashioning remedies to undo the effects of the violation of the Act, the Board must draw on the enlightenment gained from experience." The Court held that these remedies were not shown to be inappropriate. In other words, the order of reinstatement had nothing to do with whether the contract did or did not continue beyond July 31, 1959.

the established rules of collateral estoppel prevent us from accepting appellant's contention that there is such an estoppel here. One such rule is that a determination before it may become a basis for collateral estoppel must be a final one. Merriam v. Saalfield, 241 U.S. 22, 28; National Liberty Ins. Co. of America v. Police Jury, 5 cir., 96 F. 2d 261, 263; and see Restatement of Law of Judgments § 41, Comment e, and § 68, Comment s. It is also the rule that where estoppel by judgment is asserted, the earlier determination must have been of a question of fact essential to the earlier judgment. As noted in the Restatement of the Law of Judgments, § 68, the problem of collateral estoppel by judgment only arises "[w]here a question of fact *essential to the judgment* is actually litigated and determined by a valid and final judgment." (Emphasis added.) See Comment "o" under that section: "The rules stated in this Section are applicable only where the facts determined are essential to the judgment. Where the jury or the court makes findings of fact but the judgment is not dependent upon these findings, they are not conclusive between the parties in a subsequent action based upon a different cause of action." This court has had occasion to apply the rule thus stated. See E. V. Prentice Machinery Co. v. Associated Plywood Mills, 9 cir., 252 F. 2d 473, 476-477; Travelers Indemnity Co. v. State Farm Mutual Auto Ins., 9 cir., 330 F. 2d 250, 257.

The reason that the limitations on the application of collateral estoppel doctrine which we have here mentioned are particularly applicable in this case is that the Board, after first accepting the recommendation of the trial examiner that the General Counsel's complaint be dismissed, subsequently granted the petition for reconsideration of the Board's decision and order and upon such reconsidera-

tion entered a new decision and order in which the Board reached an entirely different conclusion. Thus the first order of the Board was not a final one.

Furthermore, an examination of the decision finally reached in those proceedings demonstrates that the question of contract termination was in no manner essential to that decision.

§ 8(a)(5) makes it an unfair labor practice for the employer "to refuse to bargain collectively with the representatives of his employees," and § 8(d), defining what is meant by the duty to bargain collectively, provides that it is "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . ." What the Board in this final decision held was simply that a management decision to subcontract work out of an existing unit was a mandatory subject of collective bargaining under the Act. In short, it simply held that contracting out is a matter relating to "other terms and conditions of employment." The Supreme Court in Fibreboard Corp. v. Labor Board, supra, affirming the judgment enforcing the Board's order, defined this final ruling of the Board as follows: "This ruling was based upon the doctrine established in Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1027, *enforcement granted,* 316 F. 2d 846 (C.A. 5th Cir., 1963), that contracting out work, 'albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of § 8 (a)(5) of the Act.'" In reaching that conclusion, whether the contract was or was not a continuing one was wholly immaterial. As stated by the appellees here "The obligation of Fibreboard to bargain existed whether there was a con-

tinuing contract or not. A finding that the contract terminated was not necessary for the Board's decision and played no part in the point finally and actually litigated and decided, the § 8(a)(5) violation." With this we agree. Thus it is plain that the finding of the trial examiner with respect to the termination of the contract was in no sense essential to the final decision of the Board.[7]

We are therefore of the view that the order of the trial court here in question was a proper one and accordingly the same is affirmed.

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7. It may even be suggested on the basis of the record that such finding of the trial examiner with respect to the termination of the contract was accepted by the Board neither in its final nor in its first decision. The record indicates that the Board's first decision was based not upon any finding of termination of the contract but upon the Board's view that an employer's decision to subcontract was a management prerogative having nothing to do with the "terms and conditions of employment" as defined in the Act. When the Board in its final decision referred to its earlier decision, it described that decision as follows: "In their view, Respondent's decision to subcontract was a management prerogative having no impact on the conditions of employment within the existing maintenance unit, and hence need not have been submitted to the Charging Union before that decision was effectuated."

United States Court of Appeals for the Ninth Circuit

No. 19,006

Fibreboard Paper Products Corp., a Corporation,
Appellant,

vs.

East Bay Union of Machinists, Local 1304, etc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed. Filed and entered February 3, 1965

United States Court of Appeals for the Ninth Circuit

No. 19,006

Fibreboard Paper Products Corporation, a corporation,
Appellant,
vs.
East Bay Union of Machinists, Local 1304, etc., et al.,
Appellees.

[Apr. 20, 1965]

Upon Petition for Rehearing

Before Pope, Koelsch and Duniway, Circuit Judges.

Pope, Circuit Judge.

Because petitioner in an application for rehearing undertakes to challenge propositions stated in the opinion which we thought and continue to think are self-evident, we proceed to make the following comments upon appellant's claim that it has a right to plead collateral estoppel in its answer.

The petition contains the following statement: "We take no exception at this point to the Court's conclusion that the finding of termination of the contract was not essential to the holding that Fibreboard violated the Act by contracting out the work without first negotiating with the Union. Our quarrel is with the underlying premise that this is all that the Board held. The Board also held that Fibreboard did *not* violate the Act in failing to give the notices for which section 8(d)(3) provides. Its finding that the contract had terminated plainly *was* essential to that holding."

We think this discloses a failure to understand what the Labor Board actually decided. The trial examiner first held in respect to the charge that Fibreboard had been guilty of an unfair labor practice in failing to bargain collectively with the Union that there was no duty so to bargain because the contract had been terminated as a result of the Union's notice to the employer, and hence that there was no obligation to serve the notice called for by § 8(d) of the Act which defines what constitutes collective bargaining. After the Board granted a rehearing it held that Fibreboard was under a duty to bargain collectively in any event. Because of this decision, whether the 8(d) notice was or was not given or called for, and the whole question of termination, was no longer involved. It would have been a complete absurdity for the Board to say: "Yes, you must bargain, but the contract was terminated." At that stage whether the contract was terminated or not was completely irrelevant and wholly outside the line of decision. The whole matter of termination simply fell to the ground for that reason.

This is further demonstrated when we consider that the final decision of the Board supported the Union in its charge of an unfair labor practice in its failure to bargain collectively. Thus the Union had won on this point; and it was in no position to appeal or seek review in respect to its claim of a failure to bargain collectively either as respects § 8(a)(5) or the related § 8(d) which defines what is meant by the duty to bargain collectively.

The Union did seek review in respect to other matters. As noted in East Bay Union of Machinists Local 1304 v. N.L.R.B. 322 F.2d 411, 413, "The Union challenges (a) the Board failure to find a violation of § 8(a) (3) and (b) the Board's failure to make the remedial order of back pay operative to the date of termination of employment." The

Union sought no review of the order relating to the claimed violation of § 8(a)(5) for the plain reason that it was not aggrieved on that point; and it could not have urged any point with respect to the notices under 8(d). Appellant's attempt to assert collateral estoppel in respect to an alleged finding of termination must therefore fail under the rule stated in Restatement of the Law of Judgments, § 69(2).[1]

As Professor Davis points out (Administrative Law Treatise, Vol. 2, § 18.02), while the doctrine of res judicata is applicable to "*some* administrative proceedings" the cases "add up to the sound proposition that administrative decisions are sometimes res judicata and sometimes not." Although this matter was not discussed in our original opinion it would appear to be plain that under the circumstances here present the doctrine of collateral estoppel (or res-judicata, as Professor Davis calls it,) would not be applicable here.

The petition for rehearing is denied.

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1. Note particularly the Comment on this subsection as follows: "Comment on Subsection (2): c. *Where there is a finding of one issue against the successful party.* Where a judgment is rendered by a court of first instance in favor of a party, but a particular issue is decided against him, and because the judgment is rendered in his favor he has no ground for appealing from the judgment, the finding on the particular issue decided against him is not conclusive in a subsequent action between the parties based upon a different cause of action. Thus, if the defendant interposes two defenses, either of which is sufficient to bar the plaintiff's claim, and there is a finding for the defendant on one of the issues, a finding for the plaintiff on the other issue is not binding in a subsequent action upon a different cause of action. One reason for this is that the finding is not material to the judgment (see § 68, Comment o); another reason is that the defendant, having been successful in the action, cannot appeal and obtain the ruling of the appellate court as to the finding against him."

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 20, 1965

Before: Pope, Koelsch and Duniway, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed February 26, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix B

Labor Management Relations Act

§ 185. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or

agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

National Labor Relations Act

§ 160. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provi-

sion of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules

of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the

extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if sup-

ported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certioari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in

the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Institution of court proceedings as stay of Board's order

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Jurisdiction of courts unaffected by limitations prescribed in sections 101-115 of this title

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101-115 of this title.

Expeditious hearings on petitions

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

Injunctions

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Hearings on jurisdictional strikes

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint

should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

Priority of cases

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section. June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub.L. 86-257, Title VII, §§ 704(d), 706, 73 Stat. 544.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner

v.

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

This is a suit brought by the Union under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, claiming that the Company violated its collective bargaining agreement by contracting out certain work.

In its answer to the complaint, the Company asserted, as an affirmative defense, that the Union is precluded by collateral estoppel from contending that there was an agreement in effect on the date of the contracting out. The district court granted the Union's motion to strike this defense and, on interlocutory appeal, the Court of Appeals affirmed. The petition for certiorari seeks review of that decision.

The prior litigation, alleged to constitute the basis for this collateral estoppel claim, arose out of a charge filed by the Union with the National Labor Relations Board that the Company, by contracting out the work without prior notice to and discussion with the Union, had refused to bargain in violation of Section 8(a)(5) of the Act. The Board originally found no violation, 130 N.L.R.B. 1558 (1961), but on motion for reconsideration reversed itself, 138 N.L.R.B. 550 (1962). Its ultimate decision, holding that the Company had violated the Act, was affirmed by the Court of Appeals for the District of Columbia, 322 F.2d 411 (1963), and by this Court, 379 U. S. 203 (1965).

The Company does not challenge the Union's right to bring separate proceedings, one before the Board and the other in the courts, to enforce its separate statutory and contractual interests. Indeed, the Union's right to do so is by now clearly established. *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197 (1962); *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261 (1964); *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 152-53 (5th Cir. 1964), *cert. den.* 379 U. S. 991 (1965). Nor does the Company contend that the award in the Board proceeding moots this action. The Board, in the prior litigation, provided back pay to the affected employees only for part of the period of their unemployment. Its reason for limiting its remedy would not bar a full recovery under the agreement, 138 N.L.R.B. at 555, n. 21. The Union has brought this action to obtain the additional lost wages due the employees under the agreement, for the two-year period not covered by the Board award.

The Company's sole contention with respect to the prior litigation is that there was a final determination therein that the agreement terminated on July 31, 1959; that that determination was essential to the judgment therein; and that, accordingly, the Union is barred by collateral estoppel from

contending that there was an agreement in effect on August 1, 1959, when the contracting out occurred.

The Union's motion to strike the Company's "collateral estoppel" defense was based on two grounds: (1) that the normal requirements of the collateral estoppel defense had not been met; and (2) that in any event an NLRB interpretation of a collective bargaining agreement cannot preclude judicial interpretation of that agreement in a subsequent Section 301 action.

In its original decision, affirming the striking of the defense, the court below upheld the Union's first contention that the Company had not proven the traditional elements of collateral estoppel and did not reach the Union's second contention. In its decision on rehearing, however, it adopted the Union's second contention as an alternative basis for its decision.

The Company's petition for certiorari challenges the correctness of the first basis for the decision below. It does not challenge the second, alternative basis for the decision.

ARGUMENT

1. This case presents no question of federal law worthy of this Court's attention.

There is no dispute between the parties as to the legal principles governing disposition of the Company's "collateral estoppel" defense. The "established rules of collateral estoppel" (Pet. App. 11), which the Company does not challenge, were set forth in the decision below:

> "One such rule is that a determination before it may become a basis for collateral estoppel must be a final one. [Citing cases]. It is also the rule that where estoppel by judgment is asserted, the earlier determination must have been of a question of fact essential to the earlier judgment. . . ." (Pet. App. 11).

The issue in this case is *sui generis*. The Company con-

tends that in the prior litigation there was a final determination, essential to the judgment, that the agreement terminated on July 31, 1959. The Union, on the other hand, contends that there was no final determination that the agreement terminated and that, in any event, no such determination was made essential to the judgment in the earlier case. The Court below examined all the decisions in the prior case and concluded that there was no *final* determination that the agreement terminated,[1] and that, in any event,

[1] As the court below recognized, there was a decision at an early stage in the prior litigation holding that the agreement had terminated. The context in which it arose, and the reasons why the court below found it not to be a final determination, are set forth in this footnote.

When the Board litigation was first instituted, the Union and the General Counsel contended that the Company had violated Section 8(a)(5) in two separate respects: first, by contracting out work without prior discussion with the Union (this was the issue which ultimately reached this Court), and second, by purporting to terminate the agreement without serving notices required by Section 8(d). The Trial Examiner exonerated the Company on both counts. With respect to the second count, he ruled that the agreement had terminated on July 31, 1959 by its own terms, and that, accordingly, no "8(d)" notices were required. The Board, in its original decision, affirmed the Trial Examiner's decision.

On reconsideration, however, the Board, without discussing the "8(d)" notice question at all, reversed itself with respect to the other issue; ruled that the Company had violated the Act by not discussing with the Union its plans to contract out; and issued an order favorable to the Union. The effect of this reversal, as the court below recognized, was to render unnecessary any appeal by the Union from the earlier unfavorable finding on the "8(d)" notice point.

It is hornbook law that "where a judgment is rendered by a court of first instance in favor of a party, but a particular issue is decided against him, and because the judgment is rendered in his favor he has no ground for appealing from the judgment, the finding on the particular issue decided against him is not conclusive in a subsequent action between the parties based upon a different cause of action." Restatement of the Law of Judgments, § 69(2), Comment (c). Accordingly, the court below held that the Trial Examiner's ruling on the "8(d)" notice question—and the finding of termination made in conjunction with that ruling—was not a *final* judgment against the Union, and could not bar relitigation of the termination issue.

In an attempt to escape this holding, the Company makes a half-

none of the decisions indicated that the alleged termination was essential to the judgment.[2]

The court below did not decide whether there was an agreement in effect on August 1, 1959. It held only that litigation of that question is not barred by collateral estoppel. The Company will be free to press its claim that the agreement terminated on July 31, 1959, and, if it is correct, it should prevail in this action. The decision below merely holds that the Union is not foreclosed from disputing that claim.

The decision of the court below is of no significance except to the parties hereto. It resolves a *sui generis* hassle

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hearted argument that the Union *could* have appealed this unfavorable finding, despite its over-all victory, in order to expand the scope of the Board's order. But the Board has made clear, in a virtually identical case, that the scope of its order would not be affected by the finding of an additional violation based on failure to give the "8(d)" notices. *Adams Dairy, Inc.*, 137 NLRB 815, 816 (1962):

> "The Trial Examiner found that the Respondent also violated Section 8(a)(5) by failing to comply with the termination and modification procedures prescribed by Section 8(d) of the Act.... [*T*]*he additional finding would not change the scope of the Order* and we shall therefore not pass upon such finding by the Trial Examiner." (Emphasis supplied).

The petition does not appear to challenge that portion of the decision below holding that the Trial Examiner's decision, and the original Board decision affirming him, cannot constitute the basis for a collateral estoppel claim. Certainly the "Questions Presented" do not suggest such a challenge. In any event, the decision below on this point is clearly correct, and does not merit review by this Court.

[2] In its second "question presented," the Company accuses the court below of engaging in conjecture in making the latter determination. This accusation is without merit. Whenever collateral estoppel is asserted, the court is required to determine whether the finding in the prior litigation was essential to the judgment therein. Restatement of the Law of Judgments, § 68, comment (o). The burden was on the Company to prove that the finding was essential to the earlier judgment. Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 10 (1942). The Company failed to meet that burden.

over the application of acknowledged collateral estoppel principles. There is no reason for review by this Court.

2. Although this is an action for breach of a collective bargaining agreement, to be resolved by the courts under Section 301, the question which the Company seeks to litigate relates not to Section 301, but to the scope of the "duty to bargain" under Section 8(a)(5) of the LMRA:

> "Where there is in effect a bargaining contract providing for a grievance procedure culminating in arbitration, does the duty to bargain require management to negotiate with the union in advance of acting in the exercise of a right asserted by it under the contract?" (Petition, p. 2).

Congress has committed the resolution of this question—indeed of all questions involving the scope of the "duty to bargain" under Section 8(a)(5)—to the primary jurisdiction of the NLRB. But in this case the Board is not a party, nor has it had an opportunity to answer the question advanced by the Company. This Court is invited to render an interpretation of the Act which would seriously limit the Board's authority to regulate refusals to bargain, without the benefit of the Board's expertise either as decision-maker or as litigant.

The Board has in a number of decisions subsequent to *Fibreboard* discussed the scope of the duty to bargain over contracting out when there is an agreement in effect. It has not adopted the *per se* rule—advanced by the Company here—that there can be no refusal to bargain if there is an agreement in effect.[3] If this Court wishes to review the

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[3] See, e.g., *Adams Dairy, Inc.*, 137 NLRB 815 (1962), *enf. denied* 322 F. 2d 553 (8th Cir. 1963), *judgment vacated and remanded*, 379 U. S. 644 (1965); *Puerto Rico Telephone Co.*, 149 NLRB No. 84, 57 LRRM 1397, 1399 (1964). *Cf. Kennecott Copper Corp.*, 148 NLRB No. 169, 57 LRRM 1217 (1964); *Shell Oil Co.*, 149 NLRB No. 22, 57 LRRM 1271 (1964); *General Motors Corp.*, 149 NLRB No. 40, 57 LRRM 1277 (1964).

Board's reasoning in this area, it will have ample opportunity to do so when review is sought from these Board decisions. It need not, and should not, decide so portentous a question in a tangential "collateral estoppel" context, without the benefit of the Board's expertise.

3. In any event, the Company's broad legal question as to the scope of the "duty to bargain" is not presented by this case.

The Company argues that the termination of the agreement *should have been* deemed essential to the finding that it violated the Act. But what this Court might now decide concerning the impact of an agreement upon the "duty to bargain" is irrelevant so far as collateral estoppel is concerned. The test for collateral estoppel purposes is what *was* made essential to the earlier decision, not what *should have been*. As this Court stated in *Myers* v. *International Trust Co.*, 263 U. S. 64, 71, (1923):

> "In all cases . . . where it is sought to apply estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It cannot be seriously contended that the termination of the agreement *was* made essential to the decisions in the prior litigation. This Court's discussion on the question of law before it did not once indicate that the result turned upon the existence or non-existence of an agreement, 379 U. S. at 209-215. Neither did the decisions of the Board and the Court of Appeals.

This silence is not surprising. For the fact is that the Company did not, in the prior litigation, contend that the lawfulness of its action under Section 8(a)(5), turned on

the existence or non-existence of a collective bargaining agreement. It cannot now claim collateral estoppel on an issue which, because not pressed by it, was not resolved in the prior litigation.

4. *Timken Roller Bearing Co.* v. *NLRB,* 161 F.2d 949 (6th Cir. 1947), upon which the Company now so heavily relies (Pet. pp. 6-11), is not in point. There, the Company contracted out certain work, and the employees struck in breach of contract to compel it to recapture the work. The Company stated that if the employees would end the strike and return to work, it would discuss the dispute in the grievance procedure provided for in the agreement. The Union filed a charge with the NLRB alleging that the Company was violating Section 8(a)(5). The Company defended on the gound that it was bargaining in good faith, since it was willing to discuss the dispute in the grievance procedure once the strike ended. The Court of Appeals for the Sixth Circuit agreed, 161 F.2d at 955:

> "The record discloses no categorical refusal to bargain. The company's position was that it would negotiate in respect to the causes of the strike if the breach of contract were repaired, the men put back to work and grievances filed in accordance with the grievance procedures. Indeed, the company went further, —it offered to eliminate certain steps in the procedure which might have delayed adjustment, and to pass at once to the final steps provided. This was an offer reasonably in pursuit of the bargaining process, To construe it as refusal to bargain can be justified only by the fact that the offer was not made in good faith. Not only is there no finding by the Labor Board that the proposal of the company was made in bad faith pursuant of a purpose to avoid bargaining, but there is not a scintilla of evidence that would support such a finding if made, and its earlier and subsequent bargaining history repels any inference in that respect."

The *Timken* decision does not stand for the broad proposition—asserted by the Company—that there can never be a refusal to bargain when there is a contract in effect. It holds only that, in certain circumstances, a company may fulfill its bargaining obligation by "channeling" discussions through the contractual grievance procedure. Whatever the correctness of this decision (it has not been followed in a single case in 18 years), it is totally inapplicable to the facts of this case.

Here, unlike *Timken,* the Company did not offer to resolve the dispute pursuant to the grievance procedure. Indeed, here the Union's request that the dispute be resolved through the grievance procedure was expressly rejected by the Company (Record, p. 88, *Fibreboard Paper Products Corp. v. NLRB,* October Term, 1963, No. 610).

Furthermore, here, unlike *Timken,* the Company did not offer as a defense to the refusal to bargain charge that it was willing to resolve the dispute through the grievance procedure. As we have already noted, it is the failure of the Company to make such a defense which accounts for the silence of the opinions in the earlier litigation on this point. Since the contention was not advanced in the prior litigation, there can be no collateral estoppel.

5. The decision below rests on an alternative ground which the petition does not question.

In addition to its contention that traditional requirements of collateral estoppel had not been met, the Union advanced below an alternative argument; that an NLRB interpretation of a collective bargaining agreement cannot preclude judicial interpretation of that agreement in a subsequent action under Section 301. This follows, the Union argued, from the clear Congressional mandate that disputes under collective bargaining agreements be resolved by the courts, and not by the NLRB. The legislative history on this point

was summarized by this Court in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 206-07 (1962).[4]

In its original decision, the Court below expressly refrained from ruling on this contention, stating that it was unnecessary to do so because, even if a Board decision *could* constitute the basis for collateral estoppel, the Company had not satisfied "the established rules of collateral estoppel." (Pet. App. pp. 10-11).

In its decision on rehearing, however, the Court below did address itself to the question. It decided that "under the circumstances here present" an NLRB decision cannot constitute the basis for a claim of collateral estoppel:

> "As Professor Davis points out (Administrative Law, Treatise, Vol. 2 § 18.02), while the doctrine of res judicata is applicable to 'some administrative proceedings' the cases 'add up to the sound proposition that administrative decisions are sometimes res judicata and sometimes not.' Although this matter was not discussed in our original opinion it would appear to be plain that under the circumstances here present the doctrine of collateral estoppel (or res judicata, as Professor Davis calls it), would not be applicable here." (Pet. App. 17).

This alternative basis for the decision below, not questioned in the petition, stands as an independent bar to the granting of the petition for certiorari.

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[4] "Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes." *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 152 (5th Cir. 1964), *cert. den.* 379 U. S. 991 (1965).

CONCLUSION

For the reasons set forth hereinabove, the petition for certiorari should be denied.

Respectfully submitted,

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